In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1088

JOHN JOSEPH LOMBARDOZZI, DANIEL JOSEPH MARINO, MICHAEL JOSEPH ZAMPELLO, CAMILLO CHARLES LOMBARDOZZI AND GEORGE LOMBARDOZZI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A. 1a–3a) is reported at 343 F. 2d 127. The opinion of the district court (Pet. App. B. 4a–7a) is reported at 236 F. Supp. 957.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 1965. The petition for a writ of certiorari was filed on April 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

774-420—65

QUESTION PRESENTED

Whether, in denying a motion for a new trial on the ground of newly discovered evidence, the trial court erred in refusing to order the government to produce medical records with respect to a witness at the trial.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of having forcibly assaulted F.B.I. Agent John Foley while he was engaged in the performance of his official duties. Each was sentenced to imprisonment for twenty months. The court of appeals affirmed, 335 F. 2d 414, and this Court denied certiorari, 379 U.S. 914.

The evidence introduced at petitioners' trial is set forth in the government's brief in opposition in No. 441, O.T. 1964. Briefly, it showed that Agent Foley had been assigned to conduct a surveillance at the funeral of Carmello Lombardozzi. While he was carrying out this assignment, he was attacked. Hector Mangual, a funeral limousine driver, was one of the witnesses who named the assailants. He identified four of the petitioners.[1]

About two months after conviction, petitioners moved for a new trial on the ground that Hector Mangual had recanted his trial testimony (1 R. 5–6). At a hearing on February 25, 1964, they called Mangual as their sole witness and played a recording of his recantation (2 R. 3–4). When Mangual

[1] He did not identify George Lombardozzi.

explained that he had made the recording through fear, petitioners withdrew their motion (2 R. 5–8).

As a result of this proceeding, the four petitioners whom Mangual had identified were charged with conspiracy to obstruct justice. They were tried in July 1964 and acquitted. At this trial the government turned over to the defense an F.B.I. report dated March 19, 1964 (1 R. 6), which summarized an interview with a Navy psychologist who had reviewed Mangual's medical record during his Marine Corps service. On the basis of this medical record, covering the period 1951–1955, the psychologist considered Mangual to be mentally unstable and concluded he would be apprehensive of any statement or testimony from Mangual (1 R. 10–11).

On November 24, 1964, eight days after the denial of the petition for a writ of certiorari in the assault case, petitioners, relying on the F.B.I. report, moved for a new trial on the ground of newly discovered evidence. They claimed that Mangual was mentally unstable at the time of trial. They also requested the production of medical reports pertaining to Mangual in the possession of the Bureau of Naval Medicine and Surgery (1 R. 3–4). The Assistant United States Attorney, in an affidavit in opposition, stated, *inter alia,* that he had not known about this medical record at the time of trial (1 R. 15).[2] On December 10, 1964, the district court denied petitioner's motion. It found that it was satisfied that Mangual's testimony was not

[2] An affidavit of the psychologist which explained his statements to the F.B.I. agent was also filed (1 R. 18–20).

false and that the evidence adduced at the trial "overwhelmingly established the defendants' guilt." The court also concluded that a new trial should not be granted merely to impeach the credibility of one witness, noting that a claim of mental incompetency some nine or more years earlier would not be probative of Mangual's present condition (Pet. App. B. 4a–7a).

ARGUMENT

The trial court found that the evidence at petitioners' trial, where seven witnesses testified, overwhelmingly supported the conviction. It also found that the Navy officer's conclusion, based upon a medical record dating from 1951–1955, that Mangual was unstable did not show that his testimony at petitioners' trial was false. In these circumstances, the decision denying the motion for a new trial was properly affirmed. See *United States* v. *Johnson*, 327 U.S. 106.

Moreover, since the trial court justifiably concluded that Mangual's testimony had been corroborated by other evidence, the 1951–1955 medical record could not cast serious doubt on that testimony. Accordingly, the court was warranted in declining to order the production of the records pertaining to Mangual's personal history and treatment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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